

Protest of)
) Date: August 3, 1992
CAROL JOHNSON)
) P.S. Protest No. 92-46
Solicitation No. 980-4032-92)

DECISION

Ms. Carol Johnson protests the failure of the Manager, Seattle Transportation Management Service Center (TMSC) to permit her to withdraw her bid under a solicitation for highway box delivery service between Bonners Ferry and Eastport, ID.

Solicitation No. 980-4032-92, for service on the route from July 1, 1992, through June 30, 1996, was issued on March 25, 1992, with a closing date of April 28, 1992. The solicitation included a representation that there were 235 boxes on the route and estimates of 2,020 annual schedule hours and 23,972.4 annual schedule miles.^{1/}

^{1/} These estimates were accompanied by footnotes which stated, in part:

The estimated annual miles ... are given only as information....

* * *

The estimated annual hours are approximately the number of hours needed to operate the trips as they are shown in the schedule. Also included in the total estimated annual hours are the number of hours needed for casing, loading/unloading and mail mark-up. Prior to submitting a bid, the bidder must determine the actual hours [and actual miles].

The solicitation also included a provision for adjusting the number of contract hours for increases in the route mileage or in the number of boxes served:

ADJUSTMENTS IN ANNUAL HOURS: If the contracting officer and the contractor are unable to mutually agree to an adjustment in the annual hours for a service change the following formula will apply. Adjustments in the annual hours for casing and route operations will be computed using two constant factors. Multiply the number of additional boxes by 3.64 and the additional miles by 10.40. The sum of the two equals the new hours added to the contract.

Ms. Johnson submitted the lowest bid of nine received, at an annual rate of \$15,131.64.^{1/} On May 18, Ms. Johnson wrote the TMSC a letter requesting to increase her bid by \$436.48, to compensate for a mistaken failure to allow for the cost of a hired driver for 32 days per year.^{1/} On May 27, the TMSC denied the request on the grounds that the contractor's obligations to compensate hired drivers were stated in the solicitation.

On June 4 the TMSC received from Ms. Johnson a letter requesting that she be permitted to withdraw her bid due to the omission of the cost of a hired driver and because of the bidder's belief, based on conversations with the Bonners Ferry postmaster, that the route could not be served, except in optimal conditions, in the number of hours estimated in the solicitation. On June 10, the TMSC denied Ms. Johnson's request to withdraw her bid, and awarded the route to her as the low bidder.^{1/}

Ms. Johnson's protest repeats the view that the number of hours estimated in the solicitation is insufficient to operate the route. Based on her subsequent inspection of the route, she asserts that there are 277 boxes on the route, not 235, and that the solicitation's formula to adjust the number of hours based on an increase in boxes on the route does not realistically compensate the contractor for the hours needed. She further contends that the Postal Service knew based on a survey of the route conducted in August, 1992, while it was being operated by a previous contractor, that the required hours exceeded the figure stated in the solicitation.^{1/} The protest does not restate Ms. Johnson's earlier claim of mistake based on the failure to include hours for a hired driver.

^{2/} The next two lower bids had annual rates of \$16,615.85 and \$16,631.00, respectively.

^{3/} Hired drivers must be paid wages and benefits pursuant to Service Contract Act wage determinations, while owner-operators may receive lesser compensation.

^{4/} Bidders' requests to correct or withdraw bids on transportation contracts as the result of mistakes discovered before award are governed by procedures set out at Procurement Manual (PM) 12.7.6. Those procedures provide, inter alia, that a bid may be withdrawn if "clear and convincing evidence establishes the existence of a mistake," and a bid may be revised but not withdrawn "if the evidence is clear and convincing both as to the existence of the mistake and the bid actually intended, and if the bid, both as uncorrected and corrected, is the lowest received...." PM 12.7.6.b.3. (a) (1),(2). A contracting officer's determination whether or not to allow revision or withdrawal of a bid is subject to "review by assigned counsel and approval by the next-higher level of contracting authority before issuance...." PM 12.7.6 b.3.(e). The file does not reflect that the review and approval required by this section was obtained.

^{5/} The material supplied suggests the then incumbent contractor believed that the route required 7.4 hours per day (2247.4 annual hours) instead of 6.17 hours per day (1871 annual hours).

In his report on the protest, the contracting officer states that the 2020 figure for annual hours estimated in the solicitation was an increase of 151 hours (to 6.65 hours/day) over the prior contract, and that the postmaster's statements related to the earlier situation. He also asserts that the solicitation made clear that the number of hours was represented to be only an estimate, and that bidders were to determine actual hours for themselves.

The contracting officer states that the formula for increasing contract hours and compensation for increases in the number of boxes on the route is clearly presented in the solicitation, and that it provides more than adequate compensation.^{1/} The contracting officer also avers that to the extent the protest is based on the solicitation's alleged misrepresentations of the hours and work involved in performing the contract, it is untimely filed because PM 4.5.4 b. provides that:

[p]rotests based upon alleged deficiencies in a solicitation that are apparent before the date set for the receipt proposals must be received by the date and time set for the receipt of proposals.

Ms. Johnson has replied to the contracting officer's statement, reiterating her concern about the inaccurate description of the route in the solicitation, and with problems about the route which have been disclosed as the result of her initial performance of the contract, such as insufficient allowance of casing time and problems of road conditions and street and box nomenclature. Ms. Johnson also complains about the local unavailability of the Procurement Manual, and recommends that it be made available in post offices and public libraries.^{1/}

To these points, the contracting officer replies that the schedule allows sufficient time for casing of mail, Ms. Johnson's initial difficulty in sorting the mail in the time allowed stems from her lack of experience in the task and the condition of the roads on the route has not changed, and it was Ms. Johnson's responsibility to inspect the route before bidding.

Discussion

The timeliness requirements imposed by our regulations are jurisdictional, and we cannot consider the merits issues which has been untimely raised. International Jet Aviation Services, P.S. Protest No. 87-36, September 1, 1987; Omnicon, Inc., P.S.

^{6/} It appears that Ms. Johnson was given the forms necessary to claim an adjustment in contract hours and price based on an increase in the number of boxes on the route, and that she has been granted a contract adjustment to reflect the presence of 276 boxes on the route.

^{7/} Concerns about the public availability of the Procurement Manual are outside our bid protest jurisdiction. We note that the PM is available for purchase by the public from the Superintendent of Documents, U. S. Government Printing Office.

Protest No. 84-24, June 25, 1984. We have no authority to waive or disregard the timeliness issue in a particular case. POVECO, Inc. et al., P.S. Protest No. 85-43, October 30, 1985. Ms. Johnson's protest against any errors in the solicitation's estimate of annual hours and its other alleged defects solicitation is untimely.

of To the extent that the protest is against the contracting officer's refusal to allow Ms. Johnson to correct or withdraw her bid because of his failure to recognize the solicitation's deficiencies, the protest is without merit.

A mistake resulting from a clear-cut arithmetical or clerical error, or from a misreading of the specifications, must be distinguished on the evidence presented from a mistake in business judgment. Where a contractor fails to interpret correctly various elements of the specifications, the price may be reformed if the contractor can show, by clear and convincing evidence, the process he used in compiling his bid and what his bid would have been but for the error. However, where the error is the result of a mistake in judgment flowing from gross negligence on the part of the contractor to read and consider the specifications carefully, the responsibility rests with the contractor and relief will not be granted. Liebherr Crane Corp. v. United States, 6 FPD & 15 (Fed. Cir., February 7, 1987); see also United States v. Hamilton Enterprises, Inc., 711 F.2d 1038 (Fed. Cir., 1983); Aydin Corp. v. United States, 669 F.2d 681 (Cl. Ct. 1982).

Wetler Corporation, P. S. Mistake Claim No. 87-03, July 23, 1987. Here, the solicitation put the responsibility on the bidders to examine the route and determine for themselves the features which would have an impact on their bids to perform the required service. Ms. Johnson's failure to do so before bidding is not the sort of mistake for which relief can be granted.

The protest is dismissed in part and denied in part.

William J. Jones
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Office of Contracts and Property Law